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## CONDITIONS IN CONTRACTS.[1]

### I. DEFINITIONS.

"A condition is a fact or event, which must precede some change in the legal relations of two parties. To constitute a condition, however, the fact in question must be uncertain. * * * The uncertainty in regard to a fact which makes that fact a condition, need not be objective uncertainty; it is sufficient if that uncertainty exists in the mind of the party who seeks to treat that fact as a condition."[2]

While Langdell insists,[3] and there is authority for that view, that a fact or event must be future as well as uncertain before it can be a condition, Harriman would seem to be right in saying that uncertainty in the minds of the parties is enough.[4]

[1]When the late Professor Langdell was teaching at the Harvard Law School, he had privately printed for the use of his classes certain "Rules on Conditions in Contracts." Those rules, which were designed to meet a need of law students which has not yet adequately been provided for, constitute the inspiration and the foundation of this article. The increasingly important field of the operation or performance of contracts with which rules on conditions have to do has been somewhat slighted by later text writers, who have been too much inclined to treat conditions simply as a relatively unimportant branch of the law of the discharge or breach of contracts. No attempt is made here to cover the whole field of conditions, but it is sought to furnish clear definitions and then to state in the form of rules the doctrines of the cases. In framing the rules an effort has been made to give credit to Professor Langdell wherever possible, and in a number of instances his own wording, which is characteristically exact and illuminating, has been retained. Whatever of value the rules may have that is not attributed to Professor Langdell should be credited to Professor Williston, under whom the writer first studied the law of Contracts and to whose notes in his excellent collection of cases frequent reference is made.

[2]Harriman on Contracts (2nd ed.) sec. 299.

[3]Langdell's Summary of Contracts, sec. 26.

[4]Seward and Scales *v.* Mitchell (Tenn. 1860) 1 Coldwell, 87 and cases *pro* and *con* cited in 1 W. (Williston's Cases on Contracts) 268, n. 1.

Conditions are classified in several ways. According to one classification, conditions are either (1) express; or (2) implied.

An express condition is one stated or written out, in express terms.

An implied condition is one which is not expressed in terms but which is nevertheless regarded as a part of the contract.

Implied conditions, like implied promises, are divided into those (1) implied by law; and (2) implied in fact.

Conditions implied by law are those read into the contract by the courts to meet the needs of justice. This is how they differ from express conditions and from conditions implied in fact, both of which rest on the real or supposed actual intention of the parties. Conditions implied by law are conditions supplied by the court to govern in situations which the parties did not expressly provide for, because for one reason or another they never contemplated that the situations would arise. They are conditions which rest not on any intention which the parties had but on that fair dealing which the court should require as between litigants.[5] Wherever possible concurrent conditions are implied by law upon the general ground that the performance on one side of a contract is intended to be in exchange for the performance on the other, and so the performances should take place simultaneously; besides, concurrent conditions protect both parties.

A condition implied in fact is a condition which from the nature of the case must be performed in order that the promise of the other party may be performed, although the condition is not expressly stated.[6] Conditions implied in fact are for all practical purposes to be treated in the same way as express conditions.

Conditions are also divided in point of time into (a) Conditions precedent; (b) Conditions concurrent; (c) Conditions subsequent.

(a) A condition precedent is a condition precedent to the vesting of any liability on the other party to perform his part of the

[5]The writer has borrowed this doctrine from Professor Williston, who insists to his classes that: "The fundamental equity that one party should not be compelled to perform his promise when he has not received or is not going to receive what was promised him in exchange is the basis of conditions implied by law." The fact that the writer adopts Professor Williston's view of conditions implied by law in preference to Professor Langdell's will explain for the most part why he rewords some of Professor Langdell's rules on conditions and adds exceptions to others.

[6]"Where circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars." Coleridge, J., in Armitage *v.* Insole (1850) 14 Q. B. 728.

contract. It does not mean something precedent to the existence of the contract itself. Any fact or event which is capable of being a condition of any kind may be a condition precedent, but generally the fact or event consists of some act to be done by the covenantee or promisee.[7]

(b) Conditions concurrent are those where the performance on each side of the contract is conditional upon simultaneous performance on the other side. The fact or event which must precede the change in the legal relations of the two parties here is a tender of performance by the one seeking to put the other in default. "A concurrent condition must consist of some act to be done by the covenantee or promisee which can be done at the same moment that the covenant or promise is performed."[8] A typical case is a contract for a purchase and sale, where the money is to be paid for the article and the article to be handed over for the money—the exchange being simultaneous.

Some writers[9] insist that conditions concurrent are only a species of conditions precedent, since "an offer to perform the act called a condition concurrent" is necessary to put the other party to the contract in default. It is highly desirable, however, to retain the distinction between conditions concurrent and conditions precedent because, as we have seen, conditions concurrent are the most favored by the courts, since they most fully protect both parties, and because it aids clear thinking to classify those cases where only an offer to perform need be averred separately from those where actual performance must be averred and proved.

"The distinction between express conditions, conditions implied by law and conditions implied in fact are as applicable to concurrent conditions as to conditions precedent, though much the greater number of concurrent conditions are implied by law."[10]

(c) A condition subsequent is some fact or event other than performance itself which the contract provides shall relieve the promisor from an existing liability to perform.

Very few genuine conditions subsequent are to be found in the law of contracts, for in that law "condition subsequent" must mean "condition subsequent to the liability," if it means anything; and in contracts we do not often, in any real sense, have

[7]"A fact or event which gives rise to a right is called a condition precedent." Harriman on Contracts (2d ed.) sec. 301.

[8]Langdell, Summary of Contracts, sec. 20.

[9]See Harriman on Contracts (2d ed.) sec. 303.

[10]Langdell, Summary of Contracts, sec. 20.

conditions subsequent to liability. An example, however, of an actual condition subsequent is the clause in a fire insurance policy that after proof of loss has been furnished and liability of the company has attached that liability shall cease unless suit be brought within a certain time shorter than the regular statute of limitations.[11] In the law of property where an interest previously vested becomes divested by the happening of a condition subsequent, you have real conditions subsequent, but in the law of contracts, conditions subsequent in form usually turn out on close examination to be really conditions precedent, or in rare instances conditions concurrent. The way to test a condition subsequent in form, to see if it is such in fact, is to try to put it in precedent or concurrent form; if you can change its form, then it is not a genuine condition subsequent.[12] All conditions subsequent seem to be express.

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[11]See Semmes *v.* Hartford Ins. Co. (1871) 13 Wall. 158, and cases cited in 1 W. 728, n.

[12]While conditions subsequent rarely exist in contracts, because conditions subsequent in form usually turn out to be precedent in fact, certain events are constantly referred to by text writers as conditions subsequent.

Langdell, for instance, in his Summary of Contracts, sec. 42, says: "Any event may indeed be a condition subsequent as well as a condition precedent, but the only events which are in fact often made conditions subsequent in case of covenants or promises are those which render the performance of the covenant or promise impossible or at least impracticable;" and he cites as true conditions subsequent implied by law the death or serious illness of persons who have covenanted or promised to render personal service, and the destruction of specific property which one has covenanted or promised to convey, while he cites as express conditions subsequent: "The exceptions commonly introduced into charter parties and bills of lading by which the carrier's obligation to deliver the goods is to cease in the event of their being lost or destroyed by certain enumerated perils." But clearly in the first cases cited by Langdell the possibility of performance is a condition precedent of the liability to perform—"the performance of a condition subsequent extinguishes a pre-existing right" (Langdell, Summary, sec. 43), while the death or serious illness of the persons who have covenanted or promised to render personal service, or the destruction of specific property which one has covenanted or promised to convey, simply prevents a right from existing —and in the last case which Langdell cites, since "a negative event may constitute a condition as well as a positive one" (Langdell, Summary, sec. 43), the not happening of the loss or destruction of the goods by the enumerated perils is a condition precedent to the carrier's obligation to deliver them (see end of sec. 44, Langdell, Summary).

So Harriman in his book on Contracts says that "A fact or event which gives some one the right to put an end to some existing right of another is called a condition subsequent" (Harriman (2d ed.) sec. 301), and asserts that "if A covenants to pay B $100 per annum for ten years provided B does not use tobacco during that time, B's use of tobacco is a condition subsequent entitling A to be discharged from his obligation to pay the annuity" (Harriman (2d ed.) sec. 305), and that "if A sells a cow to B as a Jersey cow for $100 and agrees that B may return the cow if she is not a Jersey, the fact that the cow is not a Jersey is a condition

Various practical consequences depend upon the form of a condition. "In an action upon a covenant or promise the burden of alleging or proving the performance of a condition lies upon the plaintiff or defendant according as the condition is precedent or subsequent, unless the covenant or promise provides otherwise. It is competent, however, for the parties to shift the burden by providing that the defendant shall have the burden of alleging and proving that a condition precedent has not been performed or that the plaintiff will have a like burden in case of a condition subsequent.[13] In other words, where the condition is subsequent in form the plaintiff does not have to allege and at the trial does not have the burden of proving that the condition subsequent has not happened.[14] The defendant must plead the happening of the condition and must go forward with the evidence just as though it were a genuine condition subsequent; but the final burden of

subsequent, entitling B to rescind the contract" (Harriman (2d ed.) sec. 305). But it is clear that in the case about the tobacco, the use of the tobacco is not a condition subsequent to the liability of A to pay, but the not using it is the consideration of the promise, and if that consideration is not given the promise never in fact is binding on A although A, at the end of any given year, must pay the $100 until such time as it is made to appear that B is not going to give the consideration. The not using of tobacco is in effect a condition precedent to any liability of A to pay, and although A has to advance $100 at the end of each year, if tobacco has not been used by B up to that time, still if the tobacco is used it will then be plain that there never was a binding contract. Whether A can recover back payments made to B before B began to use tobacco will depend not on the law of contracts but on the law of quasi-contracts, with the chances in favor of the court saying that B by his abstinence during the years for which he was paid earned the money paid and hence it is not unconscientious for him to retain it. So, too, though the case about the Jersey cow, cited by Harriman, seems at first sight to be clearly a condition subsequent, reflection shows that the condition does not terminate any existing *liability* of B under the contract, but justifies the re-delivery of the cow and a demand for a return of the purchase money already paid, because B never was liable. One of two things is true: either there is no contract of sale at all, if the cow is not a Jersey, unless the buyer chooses to waive his right to repudiate, or there is a sale by which title passes, but the title may be divested at the option of the buyer. So far as property is concerned, if there is a sale by which title passes, but the title may be divested, this is a condition subsequent; but so far as contracts are concerned it is not in any view of the case a condition subsequent, for if the buyer had already paid the purchase money there was no liability of his to be terminated by the return of the cow, but instead an obligation to repay the money rested on the seller, while, if the buyer had not paid, the established fact that the cow is not a Jersey shows that he never was under any liability which required to be terminated. The buyer had to return the cow, to be sure, but that was simply to escape having a liability thrust upon him because he kept still when it was his duty to act, as the case of Wheeler *v.* Klaholt (1901) 178 Mass. 141 shows.

[13]Langdell, Summary of Contracts, sec. 44.

[14]Gray *v.* Gardner (1821) 17 Mass. 188; Moody *v.* Ins. Co. (1894) 52 Ohio St. 12.

proving his case upon all the evidence rests upon the plaintiff, since the condition is in reality precedent. The foregoing makes the form of the condition often of great importance in practice.

With reference to conditions precedent, concurrent and subsequent, it should be noted that in the law of property "the courts tend to construe a condition as subsequent, rather than precedent, so as to give the grantee or devisee a present estate liable to be divested, rather that to defer the vesting,"[15] but that in the law of contracts the courts imply, wherever possible, conditions concurrent, which are unknown to the law of property.

The relation between conditions on the one hand and representations and warranties on the other hand must be kept in mind.

A representation is a statement of fact or assertion made by one party to the other, before or at the time of the making of the contract, of some matter or circumstance relating to the contract and which in part at least induces it. Though mere representations are not usually contained in the written memorandum of contract, they sometimes are, and in consequence a question may arise whether a descriptive statement in the written instrument is a mere representation. If it is a mere representation its untruth is not any cause of action, and does not affect the contract, unless it is made fraudulently. If it is not a mere representation, i. e., if it is a statement in regard to an important matter, it may be a warranty that is also a condition.

A warranty is ordinarily only a collateral contract which gives rise to an action for damages. That is what it is in the law of sales. "A warranty in a sale of personal property is a statement or representation made by the seller contemporaneously with and as part of the contract of sale, though collateral to the express object of it, having reference to the character or the quality of or the title to the goods or articles sold, and by which he promises or undertakes that certain facts are or shall be as he represents them."[16] But in insurance policies and in charter parties what is called a warranty means, not a collateral promise, but a representation or promise which is so essential a part of the contract that its truth or performance is a condition precedent to the other party's liability to perform.[17]

Whether a statement in an insurance policy or in a charter

[15] 1 Tiffany on Real Property, sec. 69.

[16] 28 Am. & Engl. Ency. of Law (1st ed.) p. 737.

[17] Ollive *v.* Booker (1847) 1 Exch. 416; Thompson *v.* Gillespy (1855) 5 E. & B. 209; 2 W. 58, n.

party amounts to a warranty or not is generally determined by its importance. "Any statement or stipulation upon the literal truth or fulfillment of which in the intention of the parties the validity of the contract is made to depend, whether appearing as a condition or warranted, or however otherwise, amounts to a warranty. But no particular form of words will make a statement or stipulation a warranty, not even the use of the word 'warranty,' where it is apparent, from the context or from the other parts of the contract, that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfillment of the statement or stipulation."[18] If the representation which forms a part of the contract is material, or if, though immaterial, its truth is guaranteed as a condition precedent to recovery, it is, in the law of insurance and of charter parties, a warranty.[19]

There are two kinds of warranty in insurance policies and in charter parties. One is the warranty as to the existence of a present or past fact known as "affirmative warranty;" the other is the warranty as to the performance of a promise known as a "promissory warranty."[20] While a promissory warranty is recognized as a promise, its primary importance is due to the fact that it is not simply a promise, but that, if it is not performed, the other party to the contract need not perform. Affirmative warranties are also conditions. "Warranties are in the nature of [express] conditions precedent in that upon a strict compliance with them in every particular depend all rights of the insured in the policy. They differ from such conditions, however, in that when the insured seeks to recover on the policy he need not set forth the warranties and recite his compliance with each; but by the weight of authority it is held that in order to defeat a recovery on the ground of a breach of warranty, it is incumbent upon the defendant to allege breaches and to prove them as alleged."[21]

In insurance policies and charter parties, therefore, unlike other contracts, a representation or promise, which from its importance receives the name warranty, is also a condition, probably

[18]May on Insurance (4th ed.) sec. 156.

[19]"The terms 'warranty' and 'condition' are often confused and used interchangeably. The distinction, however, is clear. In speaking of a representation by A to B, as a warranty, we are looking at that representation with reference to A's obligation. When we speak of the same representation as a condition, we are dealing with the effect of that representation on B's obligation." Harriman on Contracts (2d ed.) sec. 311.

[20]Vance on Insurance, sec. 105.

[21]*Id.*, sec. 104.

always in the nature of a condition precedent,[22] but differing from an ordinary condition precedent in that the defendant must allege and has the burden of proving its falsity or breach.

## II. History of Conditions.

As there are no implied conditions in unilateral contracts and as the earliest contracts were unilateral, there were originally in the common law no conditions except express ones. Before simple bilateral contracts were enforced, the courts continued to recognize only express conditions. But as justice demanded the finding of conditions, the courts would scrutinize contracts under seal containing mutual covenants, for express conditions. "This gave great importance to the precise terms in which mutual covenants were expressed and it not infrequently happened that a single word turned the scale. Thus if A covenanted with B to give or do something *for* something else which B covenanted to give or do in return, it was commonly held that the word 'for' made A's covenant dependent on B's."[23] When simple bilateral contracts established a footing, the old analogies prevailed and only express conditions were recognized in such contracts.[24] It was not until in 1773, in *Kingston* v. *Preston*,[25] that it was held for the first time that the dependency of one covenant upon another would be implied so as to create a condition precedent—that is, that performance by the plaintiff would be held to be by implication a condition precedent to performance by the defendant.[26] It was in 1792 in *Goodisson* v. *Nunn*,[27] that it was held that concurrent conditions, as well as precedent ones, would be implied; and of *Rawson* v. *Johnson*,[28] following in 1801 the case of *Goodisson* v. *Nunn*, Langdell says: "With this case, therefore, the doctrine of mutual dependency was completely established as it has ever since remained."[29]

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[22]In Vance on Insurance, sec. 105, it is stated that a promissory warranty "is in the nature of a subsequent condition of defeasance, the nonfulfillment of which renders the policy voidable," but *quaere?* The only cases cited by the author, namely, Schultz *v.* Ins. Co. (1881) 6 Fed. 672 and Glendale Woolen Co. *v.* Protection Ins. Co. (1851) 21 Conn. 19 are cases where no liability attached because of the breach of condition, so the conditions, while appearing to be subsequent, were in fact precedent.

[23]Langdell, Summary of Contracts, sec. 140.

[24]*Id.*, sec. 141.

[25]2 Douglas, 689.

[26]Langdell, Summary of Contracts, sec. 143.

[27]4 T. R. 761.

[28]1 East, 203.

[29]Langdell, Summary of Contracts, sec. 143.

## III. Rules on Conditions.

In framing rules on conditions it is desirable to treat express conditions and implied conditions separately, but certain observations which apply to both kinds of conditions should be noted first. They are:

1. If after breach of a condition by one party the other party chooses to go on with the contract, he thereby waives the breach as a breach of condition, but may still sue upon it as a breach of contract.[30]

2. Where the condition is precedent, and the condition has not been dispensed with by the other party or is not a warranty in an insurance policy,[31] the party who is to perform first must allege and prove performance before the other party can be regarded as in default.[32]

3. Where the conditions are concurrent and the conditions have not been dispensed with by the other party, the party seeking to put the other in default must allege and prove tender of performance, and refusal by the other party.[33]

4. Where actual performance in the case of conditions precedent, or the tender of performance in the case of conditions concurrent, has been dispensed with by the other party, as for instance by repudiation in advance, by deliberate prevention,[34] etc., the plaintiff must allege and prove readiness and willingness on his part to perform, and his proof of readiness must show ability to have performed if there had been no repudiation, prevention, etc.[35]

### A.—Express Conditions.

Because the right to contract as one chooses is in general sacred in the eyes of the common law, we start with the proposition

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[30]Langdell, Rules on Conditions, No. 11 on implied and No. 1 on express conditions.

[31]See Vance on Insurance, sec. 104.

[32]Langdell, Summary of Contracts, sec. 30; Harriman on Contracts (2d ed.) sec. 337.

[33]See Pead *v.* Trull (1899) 173 Mass. 450 where the party to whom tender had to be made within forty-five days died, yet as the plaintiff exhibited in acts a bona fide willingness and ability to perform the court said the period was extended to give plaintiff a reasonable time after appointment of administrator.

[34]U. S. *v.* Peck (1880) 102 U. S. 64, and cases cited in 2 W. 180, n.

[35]Gray *v.* Smith (1896) 76 Fed. 525; 83 Fed. 824 and cases cited in 2 W. 285, n. See Eddy *v.* Davis (1889) 116 N. Y. 247; Robertson *v.* Davenport (1855) 27 Ala. 574.

that express conditions, having been put into the contract by the parties, must be strictly complied with.[36] With reference to such conditions, the following things must be noted:

1. "Express conditions may exist equally in bilateral and unilateral contracts; and it is immaterial whether there are also implied conditions in the same contract;"[37] but because implied conditions do not exist in unilateral contracts a court will be more apt to construe doubtful words in such contracts to create express conditions than it would in the case of bilateral contracts.[38] The fact that the terms require definition will not keep the condition from being express; for explaining what is expressed in the contract—interpretation—is not implying something not expressed.

2. A court will endeavor to construe the language of an express

[36]Harriman's statement in regard to the distinction between express and implied conditions that "it seems to be of no practical importance at the present day" (Harriman on Contracts (2d ed.) sec. 315) cannot be conceded. While it is true that express conditions and conditions implied in fact are practically one, express conditions are as unlike conditions implied by law as express contracts are unlike quasi-contracts. Harriman seems to confuse express conditions, which are the expression of that intention which the parties actually had, with conditions implied by law, which are the expression of the court's notion of that intention which the parties neither had nor expressed, because they never thought about the contingencies at all, but which just men similarly placed would have. While the courts succeed many times in getting around harsh express conditions precedent by construction, such conditions often drive a plaintiff to a quasi-contract remedy, if that is open to him, when the conditions which in the absence of express conditions the law would imply would permit a recovery on the contract itself. The fact that the court tries by a forced construction of the express conditions to reach the equitable result which conditions implied by law have in view should not blind us to the fact that the two kinds of conditions are of different natures and affected by totally different considerations. An express condition, unless it is violated, as in the New York building contract cases, by judicial legislation, must be lived up to literally; but a condition implied by law is always subject to the doctrine that where a defendant has "received a substantial portion of the consideration it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent." Carter *v.* Scargill (1875) L. R. 10 Q. B. 564, 566. The failure to discriminate between express conditions and conditions implied by law is the cause of the New York court's application to express conditions of the doctrine of substantial performance applicable only to conditions implied by law, a departure from principle, of which Harriman justly complains (Harriman on Contracts (2d ed.) sec. 339); but even the New York doctrine is less objectionable than Harriman's notion that conditions implied by law must be lived up to as literally as express conditions must be (*Ibid.* sec. 340). The practical importance of the distinction between express conditions and conditions implied by law is that it enables us to avoid the error of the New York court on the one hand and the error of Harriman on the other.

[37]Langdell, Rule 2 on Express Conditions.

[38]See Worsley *v.* Wood (1796) 6 T. R. 710; Langdell, Summary of Contracts, sec. 33.

condition in such a way as not to work an unjust forfeiture or oppression as contrasted with a mere loss of privilege.[39]

3. "Wherever it is doubtful whether certain words do or do not constitute an express condition, it is material to inquire whether they constitute a covenant or promise; for if they do not, that will be an argument in favor of their being a condition, it being a cardinal rule of interpretation to give effect in some way to all the words of a contract, if it be possible; and the argument becomes much stronger when a covenantor or promisor would otherwise have no remedy for the equivalent of his covenant or promise."[40]

4. In leases and deeds of conveyance, the courts are inclined to consider some words which would naturally import an express condition to have been inserted as a matter of form without any intention of creating a condition,[41] but no fixed rule can be laid down, and besides what is here said applies rather to conditions in the law of property than to conditions in the law of contracts.

5. In building contracts express conditions are treated in New York practically as if conditions implied in law.[42] In England, on the other hand, they are upheld so enthusiastically that a building contractor can bind himself not to attempt to set aside for the architect's fraud, a certificate of the latter which must be obtained before the contractor can recover.[43] Neither the New York nor the English view, in either extreme form mentioned above, has been adopted elsewhere. Everywhere the fraud of the other contracting party will excuse the non-performance of the express conditions,[44] and the general rule is that the fraud of the architect or his refusal to exercise an honest judgment, even though he does not collude with the defendant, will excuse a failure to produce his certificate.[45] So where the architect makes such gross mistakes in his estimates as necessarily to imply bad faith, a failure to produce his certificate is excused.[46] But with these exceptions the general American rule seems to be that the express

[39]Liverpool etc. Ins. Co. *v.* Kearney (1901) 180 U. S. 132; Globe Mutual etc. Assoc. *v.* Wagner (1900) 188 Ill. 133.

[40]Langdell, Rule 4 on Express Conditions.

[41]Substantially Langdell's Rule 7 on Express Conditions. Dawson *v.* Dyer (1833) 5 Barn. & Adolph. 584. *Cf.* Edge *v.* Boileau (1885) 16 Q. B. D. 117.

[42]Nolan *v.* Whitney (1882) 88 N. Y. 648. *Cf.* Doll *v.* Noble (1889) 116 N. Y. 230.

[43]Tullis *v.* Jacson (1892) 3 Ch. 441.

[44]Batterbury *v.* Vyse (1863) 2 H. & C. 42 and cases cited in 1 W. 696 n.

[45]Cases cited in 1 W. 696-7 n.

[46]See Chicago etc. R. R. Co. *v.* Price (1891) 138 U. S. 185, and cases cited in 1 W. 703-4 n.

condition to produce the architect's certificate must be literally complied with.[47] Even where the architect dies, the certificate seems not to be dispensed with altogether, but the appointment of a new architect must be demanded and only on refusal of the demand is the condition waived.[48]

6. In contracts to be performed to the satisfaction of the promisor, before payment by the latter, there is a tendency in the cases to let the promisor's honest judgment control in matters peculiarly the subject of personal taste and judgment, but to construe the language to mean the satisfaction of a reasonable man where quality, workmanship, and saleability, of which others can just as well judge, are wanted.[49] There is much confusion and conflict in the cases, however.

7. Where a party promises to pay a certain amount when he shall be able, recovery cannot be had against him when he "is plainly insolvent or when payment, if enforced, would strip him of his means of support."[50]

8. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."[51]

9. "While the subject-matter of an implied condition is always a covenant or promise, the words or clause in which an express condition is found may or may not constitute also a covenant or promise, according to the intention of the parties."[52]

### B.—Conditions Implied in Fact.

1. Conditions implied in fact are for all practical purposes express conditions and governed by the same rules.[53]

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[47]See 9 Cyc. 615, n. 71.

[48]As a discharge of the architect by the owner absolves the builder from the necessity of producing the certificate (Fitts *v.* Reinhart (1897) 102 Ia. 311), the refusal to appoint a new architect in place of a deceased one should have the same effect.

[49]Hawkins *v.* Graham (1889) 149 Mass. 284, and see cases cited in 1 W. 711 n.

[50]O'Brien, J., in Work *v.* Beach (1891) 13 N. Y. Supp. 678, and cases cited in 1 W. 719 n.

[51]Blackburn, J., in Bettini *v.* Gye (1876) 1 Q. B. D. 183, 187.

[52]Langdell's Rule No. 3 on Express Conditions.

[53]See Coombe *v.* Greene (1843) 11 M. & W. 480.

2. When a party's liability is conditional upon the happening of an uncertain event, knowledge of which is peculiarly within the possession of the other party—as where the landlord has promised to repair the inside of a house to which he has not reserved a right of entry for inspection purposes,—it is a condition precedent to liability on his part to perform that the other party notify him that the event has happened.[54] When, however, both parties have equal means of knowing about the event it is the duty of the promisor to perform without notice. [55]

### C.—Conditions Implied by Law.

Implied conditions ought to have been treated by the courts as defenses based upon non-performance by the plaintiff, since the defendant in each case says in effect to plaintiff:—"You have not performed your promise, hence it is not fair to compel me to perform," and for that reason some writers treat them only under the head of "Discharge of Contracts;" but as the plaintiff must allege and prove compliance with the conditions before he can recover, and as historically they have been treated as conditions, it seems better to continue to treat them as such.

Because the parties to contracts often fail to provide expressly the order in which their performances are to take place, and because in every bilateral contract, the performances are nevertheless presumed to be given in exchange for each other, the courts, in the interest of justice will, wherever possible, regard performance on either side as *prima facie* conditional on concurrent performance on the other side; and this whether the bilateral contract is under seal or not under seal.[56]

But with reference to this *prima facie* rule it must be noted:

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[54]Makin *v.* Watkinson (1870) L. R. 6 Exch. 25 and cases cited in 2 W. 144, n., 147, n.

[55]"The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle it is quite time that they should be overruled." Abinger, C. B., in Vyse *v.* Wakefield (1840) 6 M. & W. 442. See Hayden *v.* Bradley (Mass. 1856) 6 Gray, 425. But see Hugall *v.* McLean (1885) 53 L. T. Rep. 94, a case which should not be followed.

[56]This is a rewording of Langdell's general rule on Implied Conditions and first two comments thereon. *Cf.* Langdell's Summary of Contracts, secs. 132, 133.

1. If the covenant or promise on one side is to do something which requires time for its performance, while the covenant or promise on the other side is simply to pay money or give property, the act requiring time must *prima facie* be fully performed before the money is due or the property is to be handed over.[57] Instances of such contracts are: service contracts, building contracts, charter parties.[58]

2. "When by the express terms of a contract, one side is to be performed before the other, the side which is to be performed first is independent and absolute, while the other side is subject to a condition precedent,"[59] only if the other side becomes unable to perform or repudiates the contract before the first is called on, the side which is first to perform is excused.[60]

If it is uncertain from the terms of the contract when made which side is to be performed first, but it afterwards becomes certain, it is then the same as if in the original contract the dates for performance had been put in as they afterwards turn out to be.

3. "If the covenant or promise on the one side is to do specific acts which require time for their performance, while the covenant or promise on the other side is simply to pay money, and the time for the payment of the money is fixed, while the time for the performance on the other side is left indefinite and may be either before or after the money becomes payable, or partly before and partly afterwards according to circumstances, both sides of the contract will be deemed independent and absolute,"[61] except that a condition will be implied that if prior to the time fixed for the one party to pay the money the party to do the acts repudiates the contract, renders his own performance impossible, becomes insolvent or in any way makes it reasonably certain that he will not or cannot perform, the party to pay the money will be excused from performing.[62]

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[57]See Baker *v.* Higgins (1860) 21 N. Y. 397, and cases cited in 2 W. 83 n. The above rule is a rewording with variations of Langdell's Rule No. 3 on Implied Conditions. *Cf.* Langdell, Summary of Contracts, sec. 125.

[58]But "Contracts of service for a specified term are held severable when the wages can be construed as payable at specified shorter periods." 2 W. 83 n.

[59]Langdell's Rule No. 4 on Implied Conditions. But see *contra* Harriman on Contracts (2d ed.) secs. 318, 319. *Cf.* note 6, *infra.*

[60]*Cf.* Wald's Pollock on Contracts (3d ed.) 323, note.

[61]To this point the rule is Langdell's Rule No. 5 on Implied Conditions.

[62]This rule solves the difficulties Harriman had with the preceding rule, so far as they can be solved for him without adopting his notion,

4. "But when in an agreement for the sale of real estate a day is fixed for the payment of the money and nothing is said as to the time of delivering the deed, the deed will be deliverable by imputation when the money is payable; and the effect will be the same as if the same day had been expressly fixed for the payment of the money and the delivery of the deed, and the two sides of the contract will be mutual and concurrent conditions;"[63] and in general when in an agreement a day is fixed for performance on one side and nothing is said as to the time for performance on the other, the latter performance, will, if possible, be due by implication on the day fixed for the first performance.[64]

5. Where real property is to be paid for in several installments and by the contract a deed is not to be given except at the time of the receipt of the last installment, but there is no provision that the last payment shall not be due without the deed, the courts of most states will imply mutual concurrent conditions at the time of the last payment;[65] and because such conditions are implied in the interests of justice the better view would seem to be that if the seller under such a contract waits until the last installment of the purchase money is due, without having sued for some of the earlier installments, he cannot thereafter sue upon any installment without tendering a deed.[66]

6. When the covenant or promise on the one side is negative and is to refrain from doing something perpetually, while the covenant or promise on the other side is to pay money at a fixed time, it is, of course, impossible that the negative covenant should be fully performed before the money is payable,[67] but a condition will be implied that there must be neither a breach nor reasonable certainty that there will be a breach before the day comes for the payment of the money.[68]

7. Where each side of a bilateral contract is put into a separate instrument, each complete in itself and not making any reference to the other, the better rule is that each side may never-

believed to be wholly erroneous (*Cf.* Keener on Quasi-Contracts, p. 225), that conditions implied by law rest upon the ascertained intention of the parties.

[63]Langdell's Rule No. 6 on Implied Conditions.

[64]See Skillman Hdw. Co. *v.* Davis (1890) 53 N. J. L. 144.

[65]Kane *v.* Hood (Mass. 1832) 13 Pick. 281 and cases cited *pro* and *con* in 2 W. 47, n.

[66]Beecher *v.* Conradt (N. Y. 1855) 3 Kernan, 108 and cases cited *pro* and *con* in 2 W. 152 n. 2.

[67]To this point the rule is a rewording of Langdell's Rule No. 7 on Implied Conditions.

[68]See the last part of Rule 3 *supra* on Conditions implied by law.

theless be dependent, if in fact each promise was the consideration for the other and the performances were intended to be in exchange.[69] In such cases, the defendant has of course to plead the breach of condition, but when he has done that the general American rule places the burden on the plaintiff of proving affirmatively the performance of the condition on his part.[70]

8. "When the covenant or promise on the one side is to pay a fixed sum of money or do some other act and on the other side to guarantee a debt or insure against some risk or contingency, both sides of the contract will be independent and absolute; for although the covenant or promise on the one side is the equivalent of the covenant or promise on the other side, yet there is no equivalency in the performance. In such cases the covenant or promise on the one side to guarantee or insure is the full equivalent for actual performance on the other side."[71]

9. Where there has been a breach of condition after part performance of the party making default, his default cannot be taken advantage of by the other party to terminate the latter's obligation unless the breach is so substantial that it defeats the main scope or an important object of the contract[72]—that is, goes to the substance, essence or root of the contract—and even if the breach is *in limine,* that is at the outset, it is not any trifling or formal breach which will justify non-performance by the other party,[73] though a less breach will justify non-performance by the other party if the breach is *in limine* than if it takes place after part performance. A trifling breach, though not justifying non-performance, will nevertheless give the other party a right of action for damages.

A breach of a promise or covenant to perform an act at a certain time will more quickly be held to go to the essence than will a

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[69]Hunt *v.* Livermore (Mass. 1827) 5 Pick. 395 and cases *pro* and *con* cited in 2 W. 150 n. Langdell's Rule No. 8 on Implied Conditions expressed the opposite doctrine of Moggridge *v.* Jones (1811) 14 East, 486 that where each side of a bilateral contract is in a separate instrument the promises are independent and that "In fact, there are in that case two separate and distinct contracts, and it is erroneous to say that the two instruments constitute one bilateral contract; and it seems that parol evidence is not admissible to connect them together." Langdell's Rule No. 8. See Harriman on Contracts (2d ed.) sec. 334.

[70]See 2 W. 151 n.

[71]Langdell's Rule No. 9 on Implied Conditions. Christie *v.* Borelly (1860) 29 L. J. Rep. C. P. 153 and cases cited in 2 W. 176 n. *Cf.* Martindale *v.* Fisher (1745) 1 Wilson, 88.

[72]Langdell's Summary of Contracts, sec. 161; Harriman on Contracts (2d ed.) sec. 516; 2 W. 55 n.

[73]See Bettini *v.* Gye (1876) 1 Q. B. D. 183.

breach of a promise or covenant to pay money at a certain date;[74] but it should be remembered that the general American rule is that in mercantile contracts, whether an act or money only is called for, time is of the essence.[75]

10. The temporary illness of an employee which does not go to the root of the contract will not prevent him from enforcing the contract;[76] but where the illness makes it necessary to get a substitute and no adequate substitute can be obtained unless engaged for the full period of service of the sick employee, the illness goes to the root of the matter, and the employment of the substitute for the full period of service discharges the employer from further liability on the contract to the sick employee.[77]

11. A contract to employ may imply a condition not only to pay a salary but also to furnish work. It depends upon the nature of the business. If work has to be furnished, it would probably be in every case a breach to the essence not to furnish it.[78]

12. "A servant may be discharged by the master from his employment provided a sufficient cause actually exists, whether the same was known to or assigned by the master at the time of the discharge or not."[79]

13. In contracts for the purchase and sale of personal property the risk of loss through fire is on the one having the legal title,[80] but in those contracts for the sale of real property where the obligation of the buyer to take the property is absolute the weight of authority seems to put the loss on the buyer, although the legal title has not passed, since the buyer has a right to specific performance and is in equity the real party in interest.[81] As to realty, however, there is a vigorous minority.[82]

14. "In contracts for the purchase and sale of real estate there are important differences between the law of England and the law of this country as to what constitutes performance by the parties respectively. Thus in England the presumption is that the deed of conveyance is to be prepared by the buyer and tendered to the seller for execution; while in this country the pre-

[74]But see National etc. Tool Co. *v.* Standard etc. Co. (1902) 181 Mass. 275.

[75]Norrington *v.* Wright (1885) 115 U. S. 188 and cases cited in 2 W. 110 n.

[76]2 W. 69 n.

[77]Poussard *v.* Spiers (1876) 1 Q. B. D. 410 and cases cited in 2 W. 69 n.

[78]Stirling, L. J., in Turner *v.* Sawdon Co. (1901) 2 K. B. 653.

[79]Green *v.* Edgar (N. Y. 1880) 21 Hun, 414, and cases cited in 2 W. 82 n.

[80]Professor Williston in 9 Harv. Law Rev. 106 and cases cited.

[81]*Id.* 112-114 and cases cited.

[82]*Id.* 113 and cases cited. Wells *v.* Calnan (1871) 107 Mass. 514.

sumption is that it is to be prepared by the party who is to execute it. Hence in an action by the seller, it is only necessary in England to aver a readiness and willingness to execute a deed of conveyance; while in this country it is necessary to aver an execution of it and an offer to deliver it. In an action by the buyer, on the other hand, it is necessary in England to aver a tender of a deed of conveyance for execution; while in this country it is only necessary to aver a readiness and willingness and an offer to pay the purchase money upon the delivery of a deed of conveyance."[83]

15. Where a seller of real property voluntarily conveys it away after the contract of sale is made, the other party is relieved from performance in most jurisdictions on the ground that the seller has made himself unable to perform,[84] but that seems wrong on principle where it is apparent that the seller can get the property back again in time to perform.[85] It has been held in one of the majority jurisdictions that an outstanding incumbrance which neither party knew about, but which the seller could remove, did not show inability of the seller to perform.[86]

16. In leases the covenant to pay rent and the covenant to repair are in general independent;[87] but if a landlord covenants to keep premises in repair and nevertheless allows the premises to become untenantable, the tenant may move out—constructive eviction—and thereby terminate his liability for future rent.[88]

17. The general American rule is that in the case of divisible contracts—that is, contracts where part performance on one side is apportioned to part performance on the other side—conditions will be implied to prevent further performances from being compelled by a party whose breach has gone to the essence of the contract.[89] Whether or not a breach as to one or more apportioned part performances goes to the essence, that is, is so material as to defeat the other party's legitimate object in making the contract, is a question of fact in each case. The American tendency is to hold that non-performance of one installment will justify a refusal

[83]Langdell, Summary of Contracts, sec. 170.

[84]James *v.* Burchell (1880) 82 N. Y. 108 and cases cited in 2 W. 163 n. See Sir Anthony Mayne's Case (1596) 5 Rep. 20 b.

[85]See cases *contra* to James *v.* Burchell in 2 W. 163 n.

[86]Ziehen *v.* Smith (1896) 148 N. Y. 558; Higgins *v.* Eagleton (1897) 155 N. Y. 466. So an agreement to sell personal property one does not yet own is all right. Borrowman etc. Co. *v.* Free (1878) 4 Q. B. D. 500.

[87]Leavitt *v.* Fletcher (Mass. 1861) 10 Allen, 119 and cases cited in 2 W. 177 n.

[88]2 W. 177 n.

[89]Norrington *v.* Wright (1885) 115 U. S. 188 and cases cited in 2 W. 117 n. *Cf.* Wald's Pollock on Contracts (3d ed.) 331.

to proceed with the rest of the contract, whether the seller fails to deliver or whether the buyer fails to accept delivery or pay for the installment.[90]

The English doctrine, which has some American support, seems to be that the breach of a divisible contract does not justify rescission unless the acts or conduct of the wrongdoer evince an intention no longer to be bound by the contract.[91]

"Defective quality of one installment, however, does not seem generally to excuse the purchaser from taking other installments either in England or this country, though he may refuse to accept any installment when offered if it is of poor quality."[92]

18. In England and a majority of American jurisdictions it is an implied condition of a contract that the promisor shall not announce beforehand that he is not going to perform, and if he does so announce the other party may, in those jurisdictions, not only change his position accordingly, and thereby be excused from performing on his part[93] but also at once sue on the contract.[94] Before the other party changes his position, however, or sues, the party who has announced a repudiation may repent and withdraw his repudiation even against the other party's protest,[95] except where mutual promises to marry or other contracts calling particularly for steadfastness are concerned.

In all jurisdictions the party who has been notified of repudiation may, and in some jurisdictions he must,[96] wait until the time set for performance before suing, even though in reliance on the repudiation he enters into contracts with others which make it impossible for the repudiating party to withdraw his repudiation. Damages must not be enhanced against the other party needlessly, however,[97] and accordingly damages may be recovered without further performance by the other party.[98]

The doctrine of anticipatory breach above set forth must not

[90]Rugg *v.* Moore (1885) 110 Pa. St. 236, and cases cited in 2 W. 123 n.

[91]Lord Coleridge, C. J., in Freeth *v.* Burr (1874) L. R. 9 C. P. 208; Mersey Steel & Iron Co. *v.* Naylor (1884) L. R. 9 A. C. 434.

[92]Wald's Pollock on Contracts (3d ed.) 332 n; Cahen *v.* Platt (1877) 69 N. Y. 348.

[93]Rayburn *v.* Comstock (1890) 80 Mich. 448.

[94]Hochster *v.* De La Tour (1853) 2 E. & B. 678 and cases cited in 2 W. 221 n, 226 n, 240 n, and, *contra* to Daniels *v.* Newton, in 2 W. 250 n.

[95]Traver *v.* Halsted (N. Y. 1840) 23 Wend. 66; Perkins *v.* Frazier (1901-2) 107 La. 390. See Zuck *v.* McClure (1881) 98 Pa. St. 541

[96]Daniels *v.* Newton (1874) 114 Mass. 530 and cases in 2 W. 250 n.

[97]Clark *v.* Marsiglia (N. Y. 1845) 1 Denio, 317, and cases in 2 W. 255 n.

[98]Cort *v.* Ambergate etc. Ry. Co. (1851) 17 Q. B. 127; Rayburn *v.* Comstock (1890) 80 Mich. 448.

be confused with cases of actual breach of contracts calling for continued or continuous performance, where the actual breach requires the assessment of full damages.[99]

19. In the case of partly bilateral contracts, where the part which is actually performed is comparatively immaterial, and the thing promised and yet to be performed is the essential and material part of the consideration, you imply conditions just as in wholly bilateral contracts, since for all practical purposes such partly bilateral contracts are the same as wholly bilateral contracts partly performed;[100] but where the part which is actually performed is the essentially material part of the consideration and the thing promised and yet to be performed is comparatively immaterial, you do not imply conditions because the great difference between the thing promised on the one side and that promised on the other makes it as impossible to regard the performances as in exchange as we found it to be in the cases of insurance and guaranty covered by Rule 8, *supra.*

20. In wholly unilateral contracts there seem to be no implied conditions; but the courts seek to accomplish the same just result as if conditions were implied by construing a promise to exchange property for money to call for and become binding upon a tender, by giving the promisor the power of rejection of goods, etc.

21. "When a bilateral contract is in writing and performance by A is in terms made conditional upon performance by B, while B's promise is in terms absolute and unconditional, there is no room for implying a condition in B's promise, the maxim *expressum facit cessare tacitum* being applicable. The mutual promises, therefore, do not constitute mutual and concurrent conditions according to the general rule; but A's promise is subject to an express condition precedent, while B's promise is independent;"[101] except that, as in the case of rules 2 and 3, *supra,* a condition will be implied that if prior to the time fixed for B to perform A repudiates the contract, renders his own future performance impossible, becomes insolvent, or in any way makes it reasonably certain that he will not or cannot perform, B will be excused from performing.

22. Where the law implies a condition precedent it is done on grounds of justice, and after the condition has been substan-

[99]Parker *v.* Russell (1882) 133 Mass. 74 and cases cited in 2 W. 253 n.

[100]Ellen *v.* Topp (1851) 6 Exch. 424, and cases cited in 2 W. 51 n.

[101]To this point the rule is Langdell's Rule No. 14 on Implied Conditions.

tially performed, the same reason of justice makes it "no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent."[102]

When so-called impossibility of performance, which may or may not be actual impossibility, is recognized as a defense to a contract, it is in the nature of a condition implied by law which is precedent in fact but subsequent in form. Historically, however, "impossibility" has been discussed separately from conditions, and lack of space compels its exclusion here.

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[102]Parke, B., in Graves *v.* Legg (1854) 9 Exch. 709. Approved in Carter *v.* Scargill (1875) L. R. 10 Q. B. 564.